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June 30, 2022

Via FOIAonline submission

Regional Freedom of Information Officer
U.S. EPA, Region 6
1445 Ross Avenue (ORC-DF)
Dallas, TX 75202-2733

Re: Freedom of Information Act request, Alcoa (Point Comfort)/Lavaca Bay Superfund Site (CERCLIS #TXD008123168), Point Comfort, Texas

Dear Freedom of Information Act Officer(s):

This is a request for information from the U.S. Environmental Protection Agency (EPA) under the Freedom of Information Act, 5 U.S.C. § 552, and its implementing regulations. The Environmental Integrity Project (EIP) is seeking the information requested below to educate itself, its supporters, the Texas community stakeholders with whom it works, and the general public on the Alcoa (Point Comfort)/Lavaca Bay Superfund Site (CERCLIS #TXD008123168) in Point Comfort, Texas.

I. Records Requested

I respectfully request a copy of the following documents related to the Alcoa (Point Comfort)/Lavaca Bay Superfund Site:

- A. Comments submitted by USEPA Region 6 staff to the US Army Corps of Engineers Galveston District as part of the Interagency Coordination process for the Matagorda Ship Channel Improvement Project. The Army Corps' Matagorda Ship Channel Improvement Project is located partly within the Alcoa (Point Comfort)/Lavaca Bay Superfund Site. Please provide any comments that EPA provided to the Army Corps in the period beginning with the April 2017 Interagency Meeting through publication of the Final Feasibility Report Environmental Impact Statement published in August 2019.
- B. Letters and e-mail between USEPA Region 6 Superfund and Emergency Management Division Staff (Laura Hunt, Gary Baumgarten, Lisa Price, and John Meyer) and the US Army Corps of Engineers concerning the Matagorda Ship Channel Improvement Project, from April 2017 to present.
- C. Recommendations offered by USEPA to the Army Corps concerning sampling, analysis, dredging, and disposal of sediments potentially contaminated with mercury or other constituents of concern, from April 2017 to present.

II. Fee Waiver

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552(a)(4)(A)(iii), and EPA's implementing regulations, 40 C.F.R. § 2.107(l), the Environmental Integrity Project (EIP) requests that all charges (e.g., search, review, and duplication fees) incurred in connection with this FOIA request be waived.

FOIA is intended to “ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.” See *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). FOIA requires agencies to waive or reduce fees for requests “if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii).

“[A]ll public interest groups . . . will be able to qualify for fee waivers and thereby obtain documents without charge if their requests meet the standard for waivers.” *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987) (quoting 132 Cong. Rec. 29,696 (1986) (statement of Rep. English)). Congress intended the fee waiver provision to be “liberally construed in favor of waivers for noncommercial requesters.” *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) (quoting 132 Cong. Rec. 27,190 (1986) (statement of Sen. Leahy)).

Fee waivers requests must be made with “reasonable specificity” and based on more than “conclusory allegations.” *Id.* (quoting *Larson v. CIA*, 843 F.2d 1481, 1483 (D.C. Cir. 1988) (per curiam); *Nat’l Treasury Employees Union v. Griffin*, 811 F.2d 644, 647 (D.C. Cir. 1987)). But FOIA does not require “pointless specificity.” *Id.* at 1314.

As discussed below, EIP satisfies the two-pronged test for a fee waiver established in FOIA and outlined in EPA’s implementing regulations because: (i) “disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of government,” and (ii) disclosure of the information “is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii); 40 C.F.R. § 2.107(l)(1).

A. Disclosure of the requested information is in the public interest because it will contribute significantly to public understanding of the operations or activities of government.

EIP qualifies for the fee waiver because the requested information will “contribute significantly to public understanding of the operations or activities of the government.” 5 U.S.C. § 552(a)(4)(A)(iii); *see also* 40 C.F.R. § 2.107(l)(1), (2). Specifically, EIP meets each of the four factors that EPA considers with respect to the “public understanding” prong.

1. The subject of the requested records concerns the operations or activities of the government, and the informative value of this information is high

Under factors (l)(2)(i) and (l)(2)(ii), EPA considers “Whether the subject of the requested records concerns ‘the operations or activities of the government’” and “[t]he informative value of the information to be disclosed.” 40 C.F.R. § 2.107(l)(2)(i), (ii).

The subject of the records EIP has requested clearly concerns the operations and activities of the government. EIP has requested records of sediment sample collection and analysis within the Alcoa (Point Comfort)/Lavaca Bay Superfund Site. The EPA added the Alcoa Lavaca Bay site to the National Priorities List in 1994, conducted a Remedial Investigation and Feasibility Study, and issued a Record of Decision. According to EPA’s 2001 Record of Decision, “The EPA is the lead agency for Site activities, with support from the Texas Natural Resource Conservation Commission (TNRCC). EPA in conjunction with the National Oceanic and Atmospheric Administration (NOAA) and the State of Texas signed a Cooperative Management Agreement to coordinate the interests of all federal and state agencies involved with the site. Therefore, the subject of the request clearly concerns “operations or activities” with a direct and clear connection to a government agency. 28 C.F.R. § 16.10(k)(2)(i).

The informative value of this information is very high, as it will provide the public with new factual information of a timely subject that has grave implications for public health and the environment. The United States Congress has authorized a project for the U.S. Army Corps of Engineers to dredge 21 million cubic yards of sediments to widen and deepen the Matagorda Ship Channel, which includes sediments within the Alcoa Superfund Site Closed Area. A new 1200' turning basin will be excavated in Lavaca Bay adjacent to the Superfund Site and within the Closed Area. The requested records include information about the presence and location of contaminated sediments within the dredging project area. These records are of high value to the public because they may provide information concerning the likelihood of the dredging project to resuspend contaminated sediments, which could pose risks to human health and the environment.

2. Disclosure of the requested records is likely to contribute significantly to public understanding of government operations or activities

Under factors (1)(2)(iii) and (1)(2)(iv), EPA considers “The contribution to an understanding of the subject by the public is likely to result from disclosure” and “The significance of the contribution to public understanding.” 40 C.F.R. § 2.107(1)(2)(iii), (iv).

As to factor (1)(2)(iii), considerations within this factor include the “requester’s expertise in the subject area and ability and intention to effectively convey information to the public” and that the public understanding in question be that of “a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester.” *Id.*

EIP has a long, demonstrated, and continuing history of expertise and contribution to the public understanding on a number of topics pertaining to governmental operations. In furtherance of this, EIP distributes information via regularly published reports and press releases, its frequently updated website (<http://www.environmentalintegrity.org>) and social media platforms (<https://twitter.com/EIPOnline>; <https://www.facebook.com/EnvIntegrity/>), communication with partner organizations and outside media outlets, and legal and administrative documents such as public comments on agency rulemakings and permits and briefs and documents filed in litigation. EIP intends to make the same dissemination in this instance. After reviewing the information provided in response to this FOIA request, EIP intends to use its resources and expertise to inform and educate the public, the media, and other nonprofit advocacy organizations about previously documented locations of contaminated sediments in Lavaca Bay and the potential, if any, for the proposed construction to mobilize these substances.

Recent examples of EIP contributing to the public understanding of conditions influencing human and environmental health include the following:

- EIP, in collaboration with Environment Texas, published a report in October 2021 entitled, “Illegal Air Pollution in Texas In 2020: Reported Emissions Decline During COVID Recession.” <https://environmentalintegrity.org/wp-content/uploads/2021/10/Illegal-Air-Pollution-in-Texas-2020.pdf>
- EIP published a report in August 2021 entitled, “Water Quality in the Shenandoah Valley: Virginia’s Cleanup Plans Fail to Solve Bacteria Problem.” <https://environmentalintegrity.org/wp-content/uploads/2021/08/Shenandoah-Report-8.5.21.pdf>
- Together with the Houston-based One Breath Partnership, EIP published a report in July 2021 entitled, “Formaldehyde Air Pollution in Houston: Monitoring Shows Plumes of Carcinogenic Formaldehyde in Neighborhoods Along Houston’s Ship Channel.”

<https://environmentalintegrity.org/reports/formaldehyde-air-pollution-in-houston/>

- EIP published a report in April 2021 entitled, “Environmental Justice and Refinery Pollution: Benzene Monitoring Around Oil Refineries Showed More Communities at Risk in 2020.”
<https://environmentalintegrity.org/wp-content/uploads/2021/04/Benzene-report-4.28.21.pdf>

As to factor (l)(2)(iv), this is a variation on factor (l)(2)(iii)—focusing on the significance of the contribution to public understanding rather than on the public understanding itself—and therefore necessarily involves consideration as to the requester’s dissemination and expertise. As a result, the information EIP has provided regarding factor (l)(2)(iii) as to EIP’s history and means of dissemination are applicable.

Currently the public’s understanding of sediment quality in Lavaca Bay is limited due to a lack of access to site documents. Many of the most important site documents are not made publicly available at the EPA website for the Alcoa (Point Comfort)/Lavaca Bay Superfund Site (<https://cumulis.epa.gov/supercpad/cursites/csitinfo.cfm?id=0601752>). EIP intends to improve the public understanding by learning from the information requested and subsequently making this information and EIP’s expert analysis of the information available to the public.

B. Obtaining the information is of no commercial interest to EIP

As to FOIA’s second prong for fee waivers—disclosure of the information “is not primarily in the commercial interest of the requester”—EPA regulations set out two factors for the agency to consider. 40 C.F.R. § 2.107(l)(3). EIP clearly meets both of these factors.

As to factor (l)(3)(i), EPA considers “Whether the requester has a commercial interest that would be furthered by the requested disclosure.” 40 C.F.R. § 2.107(l)(3)(i). As a 501(c)(3) non-profit organization, EIP has no commercial, trade, or profit interest in the material requested. EIP will not be paid for or receive other commercial benefits from the publication or dissemination of the information requested.

Under factor (l)(3)(ii), EPA considers the requester’s primary interest in the disclosure: “Whether any identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is ‘primarily in the commercial interest of the requester.’” 40 C.F.R. § 2.107(l)(3)(ii). EIP’s primary interest is a public interest: to analyze sediment quality data collected at the Alcoa (Point Comfort)/Lavaca Bay Superfund site to better understand the potential risks of the upcoming dredging activities.

If EPA reaches a determination that the above information is insufficient to justify a fee waiver, in whole or in part, please contact me to discuss any further documentation we can provide prior to issuing a formal denial.

III. Conclusion

Please send the requested records to lfleer@environmentalintegrity.org. For records not available electronically, please deliver them by regular mail to Lauren Fleer, Environmental Integrity Project, 1000 Vermont Avenue NW, Suite 1100, Washington, DC 20005. If you find that this request is unclear in any way, please do not hesitate to contact me by phone at (773) 616-0940.

Thank you for your time and assistance. We look forward to your prompt reply.

Sincerely,

A handwritten signature in green ink, appearing to read "Lauren Fleer". The signature is fluid and cursive, with the first name "Lauren" being more prominent than the last name "Fleer".

Lauren Fleer
Environmental Engineer
Environmental Integrity Project
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